Supreme Court, U.S.
FILED

05-719 DEC 2 - 2005

OFFICE OF THE CLERK

No.

IN THE

# Supreme Court of the United States

BRUCE E. CROUSSER, PETITIONER

*v.*

UNITED STATES OF AMERICA

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE ARMED FORCES*

## PETITION FOR WRIT OF CERTIORARI

JOHN B. WELLS
*Counsel of Record*
LAW OFFICE OF JOHN B. WELLS
317 PORTSMOUTH DRIVE
SLIDELL, LA 70460-8429
985-641-1855
985-649-1536 (fax)

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦ USSCINFO.COM

## QUESTIONS PRESENTED

I. Whether the Petitioner Was Afforded Effective Assistance of Counsel Pursuant to the Sixth Amendment to the United States Constitution and the Jurisprudence of this Court.

II Whether the Military's No Contact Order Was an Undue Burden on Petitioner's Right to Marry and Raise a Family and Contributed to the Hostile Attitude of His Spouse and Her Decision to Testify Against Him

III Whether the Military Judge Violated the Due Process Clause of the Fifth Amendment to the United States Constitution in Not Producing the Defense Expert Witness as a Live Witness

## TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED ..... i

TABLE OF AUTHORITIES ..... iii

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

RELEVANT PROVISIONS INVOLVED ..... 1

STATEMENT ..... 2

REASONS FOR GRANTING OF THE PETITION ..... 5

CONCLUSION ..... 18

APPENDIX

U.S. Court of Appeals Order ..... 1a

US Army Court of Criminal Appeals Decision ..... 2a

U.S. Court of Appeals Order Denying Rehearing ..... 4a

Relevant Provisions Involved ..... 5a

## TABLE OF AUTHORITIES

Page(s)

**CASES**

ADARAND CONSTRUCTORS, INC. v. PEÑA, 515 U.S. 200, 227, 115 S.CT. 2097 (1995) ..... 13

ARIZONA v. FULMINANTE, 499 U.S. 279, 309 (1991) ..... 13

BAZZETTA v. MCGINNIS 124 F.3D 774, 779 (6TH CIR. 1997). 14

BRECHT v. ABRAHAMSON, 507 U.S. 619, 638, 113 S.CT. 1710 (1993) ..... 16

CHAMBERS v. MISSISSIPPI, 410 U.S. 284, 294 (1973) ..... 15

CRANE v. KENTUCKY, 476 U.S. 683, 690, 106 S.CT. 2142, (1986) ..... 14

GRISWOLD v. CONNECTICUT, 381 US 479 (1965) ..... 12

IN RE OLIVER, 333 U.S. 257, 273, 68 S.CT. 499 (1948) ..... 15

LAWRENCE v. TEXAS, 123 S.CT. 2472 2003 WL 21467086 (2003) ..... 12

NEALY v. CABANA, 764 F.2D 1173, 1177 (5TH CIR.1985) ..... 6

NEW JERSEY v. MICHAELS, 625 A.2D 489 (N.J. SUPER. 1993) ..... 16

RHEM v. MALCOM, 371 F.SUPP. 594, 626 (S.D.N.Y) AFF(D 507 F.2D 333 (2D CIR. 1974) ..... 14

ROE v. WADE, 410 U.S. 113 (1973) ..... 12

ROMPILLA v. BEARD, 545 U.S. ____, 125 S.CT. 2456 (2005) .... 6

SKINNER V. OKLAHOMA, 316 U.S. 535, (1942) ..... 12

STRICKLAND V. WASHINGTON, 466 U.S. AT 690-91, 104 S.CT. 2052 ..... 6, 7

UNITED STATES V. ANDREWS, 36 M.J. 922, 925 (A.F.C.M.R. 1993) ..... 15

UNITED STATES V. EILAND, 39 M.J. 566, 569 N. 4. (N.M.C.M.R. 1993) ..... 17

UNITED STATES V. FURGASON, 6 M.J. 844 (N.M.C.M.R. 1979) ..... 15

UNITED STATES V. HOUSTON 12 M.J. 907, 909 (N.M.C.M.R. 1982) ..... 13

UNITED STATES V. KINSCH 54 M.J. 641, 649 (A.C.C.A 2000) ..... 13

UNITED STATES V. POWELL, 17 M.J. 975, 976 (A.C.M.R. 1984) ..... 8, 9

UNITED STATES V. SCHEFFER, 523 U.S. 303, (1998) ..... 7

UNITED STATES V. SWEENEY, 14 U.S.C.M.A. 599, 34 C.M.R. 379 (1964) ..... 17

UNITED STATES V. THORNTON, 8 U.S.C.M.A. 446, 24 C.M.R. 256 (1957) ..... 17

UNITED STATES V. THORNTON, SUPRA, 24 C.M.R. AT 259... 10

UNITED STATES V. WAGNER, 39 M.J. 832, 833-34 (A.C.M.R. 1994) ..... 13

WIGGINS v. SMITH, 539 U.S. 510, 521, 123 S.Ct. 2527 (2003) ..... 6, 13

**STATUTES**

28 U.S.C. § 1254 .....

**RULES**

RULE 10 ..... 1

RULE 13.1 ..... 1

RULE 29.4 ..... 1

**OTHER AUTHORITIES**

MONTOYA, SOMETHING NOT SO FUNNY HAPPENED ON THE WAY TO CONVICTION: THE PRE-TRIAL INTERROGATION OF CHILD WITNESSES, 35 ARIZ L. REV. 927 (WINTER 1993) ..... 16

SHOULD CHILDREN REALLY BE SEEN AND NOT HEARD, 14 AM. J. CRIM. L. 227, 228-229 (SPRING 1987) ..... 16

## OPINIONS BELOW

The Opinion of the Court of Appeals for the Armed Forces denying reconsideration is unreported. The decision of the Court of Criminal Appeals denying relief is also unreported. The decision of the Army Court of Criminal Appeals is unreported.

## JURISDICTION

These issues are properly before the Supreme Court of the United States pursuant to 28 U.S.C. § 1254 and Rule 10 of the Supreme Court rules which govern the review on Certiorari. The final judgment of the United States Court of Appeals for the Armed Forces was entered on September 9, 2005. The submission for filing is within the 90 day requirement of Rule 13.1 of the Supreme Court Rules. This proceeding does not question the constitutionality of any Act of Congress or any State Legislature. Consequently, the provisions of Rule 29.4(b) and (c) do not apply.

## RELEVANT PROVISIONS INVOLVED

The following constitutional provisions treaties, statutes, ordinances and regulations are applicable to this proceeding:

U. S. Constitution, Amendment V.
U. S. Constitution, Amendment VI.
10 U.S.C. § 840. Art. 40. Continuances
10 U.S.C. § 863. Art. 63. Rehearings

Pertinent text of citations are set out in the appendix.

## STATEMENT

An integral and inherent part of the military justice system, as Staff Sergeant (SSG) Bruce Crousser found to his chagrin, is that the military defense counsels are generally not qualified to defend persons accused of serious felonies. Inexperienced, poorly trained and underfunded, these young defense counsels, through no fault of their own, consistently provide ineffective counsel in violation of the Sixth Amendment to the Constitution. At issue here is institutional ineffectiveness that unfairly prejudices those who defend our shores.

Petitioner Crousser was assigned to Fort Leonard Wood in October of 1999. Most of the accusations in this case arose in early October 2000 when Natasha Timms, appellant's step-daughter, claimed that he gave her a hickey while engaging in horseplay and consensual wrestling. A civilian investigation was started which soon led to complaints about appellant's conduct at his step-daughter's 16th birthday party the month before. Appellant was alleged to have inappropriately touched several young girls and made joking language to them which made them uncomfortable.

The government further claimed that appellant engaged in other roughhousing including ear pulling, placing ice down the clothing of various individuals and other boorish and obnoxious behavior. From this behavior, the government tried to infer a pattern of molestation. The court-martial found appellant not guilty

for the most egregious allegations.

Despite government attempts to criminalize boorishness, the record revealed that appellant was merely engaging in rough housing and this his conduct was misperceived. Appellant's childhood upbringing was his model in interacting with his two stepchildren. He wrestled with them constantly to include wrestling with his wife, Tammy. Wrestling allowed him to interact playfully with his family and show that he cared for them.

Petitioner was also the parent responsible for setting boundaries and for disciplining Natasha. Tension existed in the Crousser home, and the relationship between Sergeant Crousser and Natasha was strained. Natasha had made previous allegations of abuse against her mother and against Sergeant Crousser. She was aware that an investigation is initiated based upon a first-person allegation.

The investigation into allegations from Natasha and her friends were contaminated when the Division of Family Services and the Sheriff's Department, interviewed the alleged victims and witnesses together. Statements were taken from these witnesses some two weeks or more after the alleged incident and after the witnesses continued to have contact with each other further contaminating this investigation process. The defense was denied an expert witness who would have shown how this type of contamination can result in false and exaggerated statements and testimony.

On 24 January 2001, the accused's company commander, gave the accused the order that he was restricted to Fort Leonard Wood, Missouri. Additionally,

the appellant was ordered to have no contact with his wife. Appellant's First Sergeant ordered him to not contact his wife or to have contact with her except on issues such as financial support.

As an exception to the restriction, SSG Crousser was allowed to attend church services. On one occasion, SSG Crousser was also given permission to speak to a civilian attorney. At all other times, SSG Crousser lived within the limits of Fort Leonard Wood.

At trial, the court admitted Prosecution Exhibit 4 which was impressibly tainted since it referred to appellant's refusal to take a polygraph examination, in violation of MRE 707. A day after admitting the evidence, the Military Judge, who was the trier of fact, stated that he would disregard portions barred by M.R.E. 707.

At trial, defense counsel failed to object to many evidentiary matters and erroneously entered into a stipulation, without the accused's consent. This stipulation was used as a basis for denying the production of the defense's expert witness, Dr Dyer, who could have impeached the credibility of the principal prosecution witnesses. The Military Judge's repeatedly refused to produce this witness.

Appellant was tried on 13 May 2001 and 12-14 June 2001 at the U. S. Army Maneuver Support Center and Fort Leonard Wood, Ft. Leonard Wood, Missouri before a General Court-Martial convened by the Commander, HQ, United States Army Maneuver Support Center and Fort Leonard Wood. Despite the many errors in the trial and the ineffective counsel, the accused was acquitted of the

most serious charges against him. He was convicted, contrary to his pleas, of the lesser included offense of two specifications of indecent acts with another, indecent liberties, three specifications of battery, two specifications of indecent assault and indecent language.

The Military Judge sentenced the appellant to be reduced to the grade of Private, E1, to forfeit $600.00 pay per month for 36 months, to be confined for 36 months, and to be discharged from the service with a bad conduct discharge. The convening authority approved the findings of the court and, with the exception of the discharge, ordered it to be executed.

A timely appeal was filed pursuant to Art. 66 of the Uniform Code of Military Justice. The court below affirmed the findings and sentence on January 18, 2005. A timely petition for review was docketed in the Court of Appeals for the Armed Forces on March 7, 2005. The petition was denied on August 9, 2005. A timely petition for reconsideration was denied on September 9, 2005.

## REASONS FOR GRANTING THE PETITION

### I The Petitioner Was Afforded Ineffective Assistance of Counsel Pursuant to the Sixth Amendment to the United States Constitution and the Jurisprudence of this Court.

The issue in this case is ripe for review pursuant to Rule 10(c) of the Rules of the Supreme Court of the United States. The Court of Appeals for the Armed Forces has decided the issue of ineffective assistance of counsel contrary to the holdings of the Supreme Court of the United States. The court below failed to set aside the

conviction when faced with a failure by the defense team to properly investigate and prepare for trial. This is in opposition to this Court's holdings.

In *Rompilla v. Beard*, 545 U.S. ____, 125 S.Ct. 2456 (2005), this Court reaffirmed its earlier holding in *Wiggins v. Smith*, 123 S.Ct 2527 (2003). The *Rompilla* court specifically found that defense counsel had a duty to conduct a proper investigation and to prepare for trial. In the instant case that did not happen.

Pretrial investigation is essential to the effective assistance of counsel. Defense counsel must engage in a reasonable amount of pretrial investigation and "at a minimum ... interview potential witnesses and ... make an independent investigation of the facts and circumstances of the case." *Nealy v. Cabana*, 764 F.2d 1173, 1177 (5th Cir.1985). This the defense counsel did not do.

Familiarity with the facts and applicable law are fundamental responsibilities of defense counsel. *See Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527 (2003); *Strickland v. Washington*, 466 U.S. at 690-91, 104 S.Ct. 2052 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.").

Thus the articulation of specific errors can overcome the presumption of competence on the part of defense counsel. Counsel cannot be judged competent if there is no apparent tactical reason or no basis to support the tactical choice. Accordingly, the Court must conduct